

Journal of Air Law and Commerce

Volume 68 | Issue 4

Article 5

2003

Recent Developments in Aviation Law: 2003 SMU Air Law Symposium

John G. Sams

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

John G. Sams, *Recent Developments in Aviation Law: 2003 SMU Air Law Symposium*, 68 J. AIR L. & COM. 731 (2003)
<https://scholar.smu.edu/jalc/vol68/iss4/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

RECENT DEVELOPMENTS IN AVIATION LAW: 2003 SMU AIR LAW SYMPOSIUM

JOHN G. SAMS*

TABLE OF CONTENTS

I. REMOVAL TO FEDERAL COURT BASED ON COMPLETE PREEMPTION IN AVIATION CASES	732
A. WARSAW CONVENTION REMOVALS	733
B. FEDERAL AVIATION ACT AND AIRLINE DEREGULATION ACT REMOVALS	735
II. "ORDINARY PREEMPTION" OF STATE LAW CLAIMS IN AVIATION CASES	737
A. AIRLINE DEREGULATION ACT	738
B. FEDERAL AVIATION REGULATIONS	739
C. WARSAW CONVENTION - PREEMPTION OF ANTI-DISCRIMINATION STATUTES	740
1. <i>Preempted</i>	740
2. <i>Not Preempted</i>	740
III. MISCELLANEOUS WARSAW LITIGATION	741
A. WHEN IS TURBULENCE AN ACCIDENT?	741
B. IN-FLIGHT PASSENGER ILLNESS AS A WARSAW ACCIDENT	743
C. DEFINITION OF EMBARKATION	744
D. DEFINITION OF CARRIER	745
E. FORUM NON CONVENIENS UNDER WARSAW	746

* John G. Sams practices aviation law in Fort Worth, Texas, with the firm of Howell, Dorman & Sams, P.C. The firm represents manufacturers, pilots, flight schools, and operators, in product liability and personal injury litigation. John graduated from the University of Texas at Austin in 1985 with a Bachelor's Degree in Business Administration. He earned his law degree from Baylor, graduating in 1990. Prior to law school, John worked for PeopleExpress Airlines, Western Airlines, and Delta Air Lines. John is a member of the Tarrant County Bar Association, a Fellow of the Tarrant County Bar Foundation, and a Barrister in the Eldon B. Mahon Chapter of the American Inns of Court.

F. CLASS CERTIFICATION OF A WARSAW CLAIM	747
IV. GARA LITIGATION	748
V. PRIVATE CAUSES OF ACTION ARISING UNDER FEDERAL AVIATION STATUTES AND REGULATIONS.....	750
A. AIR CARRIER ACCESS ACT	750
B. AIRLINE DEREGULATION ACT	751
C. FAA SECURITY REGULATIONS.....	752
VI. GOVERNMENT CONTRACTOR DEFENSE CASES	752
VII. AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT CASES	754
VIII. MISCELLANEOUS AVIATION LITIGATION.....	757
A. CIVIL RIGHTS	757
B. CRIMINAL PROSECUTION	758
C. CONSULTING EXPERT DISQUALIFICATION	758
D. INSURANCE COVERAGE - PASSENGER SUB-LIMIT...	760

I. REMOVAL TO FEDERAL COURT BASED ON COMPLETE PREEMPTION IN AVIATION CASES

THE CASES discussed herein from 2002 address the issue of complete preemption. In analyzing the cases, it is helpful to bear in mind the difference between complete preemption and ordinary preemption. Ordinary preemption is a defense to the merits of the claim asserted when the plaintiff's state law causes of action are displaced by federal law. Complete preemption, on the other hand, is a jurisdictional term used only in connection with federal court removals. It identifies areas of federal law that completely preempt state law so that federal jurisdiction is created merely by pleading a claim that ventures into the field. ERISA and labor law are two universally recognized areas of complete preemption. The following cases illustrate the continuing debate in federal courts as to whether the Warsaw Convention¹ and the Federal Aviation Act² also completely preempt the field for removal purposes.

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Convention].

² Federal Aviation Act, 49 U.S.C. § 40101 (2003).

A. WARSAW CONVENTION REMOVALS

*Rogers v. American Airlines, Inc.*³

The issue of complete preemption under the Warsaw Convention has recently been addressed in three American Airlines cases removed to the Dallas Division of the Northern District of Texas. In *Rogers*, American removed a case from state court on the basis that the plaintiff's claim was completely preempted by the Warsaw Convention. The plaintiff's petition alleged only state law claims arising from passport difficulties encountered by a passenger on a trip to Japan. The plaintiff did not specifically plead or attempt to invoke any federal claims.⁴

Under most circumstances, of course, a defendant cannot remove a case based on the existence of a federal defense.⁵ The fact that the Warsaw Convention may preempt state law claims does not create a basis for removal unless the Warsaw Convention is among that handful of federal remedies (like ERISA) that completely preempt the field.⁶

The Fifth Circuit Court of Appeals has a stringent test for complete preemption. Among other factors, the test requires a clear expression from Congress not merely to preempt a field in state law, but to transfer jurisdiction of the subject matter from state to federal courts.⁷ Since the district court could find no such expression of congressional intent, it remanded the case.⁸

*DeGeorge v. American Airlines, Inc.*⁹

This narrow view of preemption is not shared by the Southern District of New York. In *DeGeorge*, plaintiffs brought suit in Dallas state court for damages arising from the November 2001 crash of Flight 587, an A300 bound from JFK to Santo Domingo. American removed the case to the Northern District of Texas, where it was transferred to the Southern District of New York as part of the multi-district litigation (MDL) arising from that crash. Once the case was in New York, plaintiffs moved to remand the case on the grounds that the Warsaw Convention does

³ *Rogers v. Am. Airlines, Inc.*, 192 F. Supp. 2d 661 (N.D. Tex. 2001).

⁴ *Id.* at 663-64.

⁵ *Id.* at 664.

⁶ *Id.*; see also *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir.), *cert denied*, 531 U.S. 1012 (2000).

⁷ *Rogers*, 192 F. Supp. 2d at 671 (citing *Johnson*, 214 F.3d at 632).

⁸ *Id.* at 672.

⁹ *DeGeorge v. Am. Airlines, Inc.*, No. 02 Civ. 4765(RWS), 1448(RWS), 2002 WL 31356266 (S.D.N.Y. 2002).

not give rise to removal jurisdiction.¹⁰ The Southern District of New York rejected the rationale set forth in *Rogers*. Noting that it was not bound by Fifth Circuit precedent, the Southern District of New York held that the Warsaw Convention completely preempted state law causes of action and was an appropriate basis for removal.¹¹

*Perez v. American Airlines, Inc.*¹²

Shortly after *DeGeorge* was removed from Dallas state court, American removed *Perez* to the Northern District of Texas. This case was also transferred conditionally to the MDL court, the Southern District of New York. Before the transfer order took effect, however, plaintiffs persuaded the federal court in Dallas to stay the order so that it could review jurisdiction.¹³ Based on the rationale of *Rogers*, the Northern District of Texas held that the Warsaw Convention did not create removal jurisdiction. It remanded the case to state court.¹⁴

*Fournier v. Lufthansa German Airlines*¹⁵

The issue of complete preemption under the Warsaw Convention was also addressed, but not decided, in two cases in the Northern District of Illinois. In *Fournier*, the carrier removed a case filed by a passenger who was arrested in Greece as a result of a series of misunderstandings that the court charitably called "an air travel debacle." The passenger was a physician traveling from Chicago to Athens carrying two ornamental handguns in his checked luggage. The handguns were properly declared at the time the passenger checked-in for his flight and were accepted for transport by Lufthansa. Unfortunately, the box carrying the handguns was delayed in transit. When the box arrived in Athens, it was brought through customs by a Lufthansa agent who did not declare the contents. Apparently, the guns were thereafter discovered by customs. The Lufthansa agents in Athens disclaimed any knowledge that the box contained firearms. When the passenger arrived to claim his lost bag, he was ar-

¹⁰ *Id.* at *1-2.

¹¹ *Id.* at *5 (citing *Rogers*, 192 F. Supp. 2d at 670-71).

¹² *Perez v. Am. Airlines, Inc.*, No. 3:012-CV-1235-G, 2002 U.S. Dist. LEXIS 26624 (N.D. Tex. 2002).

¹³ *Id.* at *2-3.

¹⁴ *Id.* at *6-11 (citing *Rogers*, 192 F. Supp. 2d at 670-71).

¹⁵ *Id.*; *Fournier v. Lufthansa German Airlines*, 191 F. Supp. 2d 996 (N.D. Ill. 2002).

rested by Greek police, convicted of gun smuggling, and sentenced to 16 months in prison.¹⁶

Upon his return to the United States, the passenger filed suit against Lufthansa in Cook County based on a number of state claims. Lufthansa removed the case to federal court on the grounds of complete preemption by the Warsaw Convention, the Federal Aviation Act, and the Airline Deregulation Act.¹⁷ The federal court held that neither the Airline Deregulation Act nor the Federal Aviation Act created removal jurisdiction.¹⁸ The court did not reach the issue of whether complete preemption applied to the Warsaw Convention, since Lufthansa did not offer sufficient evidence to satisfy the court that the passenger's claims were subject to the Convention. The case was remanded to state court.¹⁹

*Dorazio v. United Airlines, Corp.*²⁰

In *Dorazio*, plaintiffs brought suit in Cook County for injuries allegedly sustained when their international flight was sprayed with pesticide. United initially defended the case in state court, but removed it seven months after suit was filed on the basis of complete preemption by the Warsaw Convention.²¹ The Northern District of Illinois once again declined to address whether preemption by the Warsaw Convention created removal jurisdiction, holding instead that United's removal would be untimely even if complete preemption existed. This case was also remanded to state court.²²

B. FEDERAL AVIATION ACT AND AIRLINE DEREGULATION ACT REMOVALS

*Curtin v. Port Authority*²³

The Southern District of New York held last year that the Federal Aviation Act completely preempts state law, providing a vehicle to remove a case to federal court. In *Curtin*, the plaintiff brought suit in state court against Delta Airlines and the New York Port Authority for injuries allegedly sustained during an emergency evacuation of an aircraft. The defendants removed

¹⁶ *Id.* at 999.

¹⁷ *Id.*

¹⁸ *Id.* at 1003.

¹⁹ *Id.* at 1005.

²⁰ *Dorazio v. UAL Corp.*, No. 02 C 3689, 2002 WL 31236290 (N.D. Ill. 2002).

²¹ *Id.* at *1.

²² *Id.* at *3-4.

²³ *Curtin v. Port Auth.*, 183 F. Supp. 2d 664 (S.D.N.Y. 2002).

the case to federal court on the grounds that the plaintiff's claims were completely preempted by the Federal Aviation Act of 1958.²⁴ The court engaged in a lengthy analysis of the Federal Aviation Act and the complete preemption doctrine.²⁵ The court joined the First and Third Circuit Courts of Appeal in concluding that Congress intended to completely occupy the field of aviation safety, thus creating federal question jurisdiction for removal purposes.²⁶

*Maitra v. Mitsubishi Heavy Industries*²⁷

District courts in the Fifth Circuit, however, seem to consistently reach the opposite conclusion. The latest of several cases on this issue from district courts in Texas is *Maitra*, a case arising from a general aviation accident in which two people died. Suit was filed in Texas state court and removed by one defendant, partially on the basis that the plaintiff's claims were completely preempted by the Federal Aviation Act.²⁸ The district court recognized that there was some disagreement among the circuits on this point, but noted that district courts in the Fifth Circuit have consistently rejected the argument. Under Fifth Circuit precedent, complete preemption requires a removing defendant to establish clear Congressional intent to completely supplant state law. The district court held that the defendants had failed to demonstrate that intent by Congress.²⁹ Finding no basis for federal jurisdiction, the case was remanded to state court.³⁰

*Wayne v. DHL Worldwide Express*³¹

The Ninth Circuit also held last year that the Airline Deregulation Act does not completely preempt state law. In *Wayne*, the defendant air shipping company removed a class action lawsuit filed against it for trade practices involving the sale of cargo insurance. The removal was based on complete preemption under the Airline Deregulation Act. The district court agreed with the defendant, denied the motion to remand, and dis-

²⁴ *Id.* at 666.

²⁵ *Id.* at 667-72.

²⁶ *Id.* at 670-71.

²⁷ *Maitra v. Mitsubishi Heavy Indus.*, No. Civ. A. SA.01CA0209FBNN, 2002 WL 1491855 (W.D. Tex. 2002).

²⁸ *Id.* at *1.

²⁹ *Id.* at *6.

³⁰ *Id.* at *8.

³¹ *Wayne v. DHL Worldwide Express*, 294 F.3d 1179 (9th Cir. 2002).

missed the plaintiff's claim.³² On appeal, the Ninth Circuit briefly analyzed the Airline Deregulation Act, contrasting it with ERISA. The court concluded, without much discussion, that the ADA was not the kind of comprehensive regulatory scheme that gave rise to complete preemption. The case was remanded to state court.³³

*Kingsley v. Lania*³⁴

Complete preemption under the Airline Deregulation Act was also rejected last year by district courts in Massachusetts and the Northern District of Illinois. In *Kingsley*, Delta removed a case to the District of Massachusetts involving a passenger dispute during pre-flight screening.³⁵ Finding that the Airline Deregulation Act was not sufficiently comprehensive to support a claim of complete preemption, the court remanded the case to state court.³⁶

*Smith v. United Airlines, Inc.*³⁷

Similarly, in *Smith*, a case was removed to the Northern District of Illinois involving a passenger injury from luggage falling out of an overhead bin. United argued that the plaintiff's claim was completely preempted by the Airline Deregulation Act, supporting removal jurisdiction. The district court remanded the case, finding that the Airline Deregulation Act did not contain a civil remedy provision or create a private cause of action, thus precluding any argument in favor of complete preemption.³⁸

II. ORDINARY PREEMPTION OF STATE LAW CLAIMS IN AVIATION CASES

As discussed above, ordinary preemption is a defense to the merits of a claim that can be raised in state or federal court, regardless of whether the case can be removed. The following cases address ordinary preemption – the extent to which a federal statute displaces state law.

³² *Id.* at 1181-82.

³³ *Id.* at 1184-85.

³⁴ *Kingsley v. Lania*, 221 F. Supp. 2d 93 (D. Mass. 2002).

³⁵ *Id.* at 94-95.

³⁶ *Id.* at 98-99.

³⁷ *Smith v. United Airlines, Inc.*, No. 00 C 50373N, 2002 WL 31236392 (N.D. Ill. 2002).

³⁸ *Id.* at *1-2.

A. AIRLINE DEREGULATION ACT

*Lyn-Lea Travel Corp. v. American Airlines, Inc.*³⁹

In *Lyn-Lea Travel Corp.*, the Fifth Circuit Court of Appeals examined the scope of the Airline Deregulation Act's (ADA) preemption in a contractual dispute between a travel agency and an airline. The plaintiff travel agency had a contract with American to use its Sabre Computer Reservation System. The lease agreement required the agency to book at least 1200 transactions per month over the system. After entering into the Sabre contract, American reduced its domestic commission rate, allegedly causing harm to the travel agency's business. Eventually, the travel agency refused to pay American for the use of Sabre, and American pulled the equipment out of the agency.⁴⁰

The agency filed suit in Texas state court, claiming that American's actions caused the agency to lose some of its customers. American filed a breach of contract counter-claim. In response to the counter-claim, the agency raised the defense of fraudulent inducement, claiming that it would not have signed a Sabre contract had it known that American would soon lower its domestic commissions. The district court held that the agency's affirmative claims as well as its fraudulent inducement defense were preempted by the ADA.⁴¹

The Fifth Circuit agreed that the travel agency's affirmative claims were preempted by the ADA. The agency's claims were based in large part on the business practices of American in setting fares and commissions. Subjecting American to state common law in this area would regulate American's policies, commission structure, and reservation practices. The ADA preempts any state attempt to regulate such matters.⁴²

The Fifth Circuit did not agree, however, with the district court's disposition of the fraudulent inducement defense to American's breach of contract counter-claim.⁴³ In *American Airlines v. Wolens*, the United States Supreme Court held that the ADA does not preempt application of state law to routine breach of contract claims.⁴⁴ Based on the holding in *Wolens*, the

³⁹ *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002).

⁴⁰ *Id.* at 284-85.

⁴¹ *Id.* at 285.

⁴² *Id.* at 287-89.

⁴³ *Id.* at 289.

⁴⁴ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232-33 (1995).

Fifth Circuit ruled that defenses to an airline's affirmative breach of contract claims are not preempted by the ADA.⁴⁵

*Botz v. Omni Air Int'l*⁴⁶

The Eighth Circuit Court of Appeals held this year that a state's "whistleblower" statute was preempted by the ADA. In *Botz*, suit was brought by a flight attendant who had been discharged for refusing to accept a flight assignment that she believed violated federal "duty time" regulations. The flight attendant maintained that her discharge was in retaliation for reporting the alleged violation to her employer, and therefore, constituted a violation of Minnesota's whistleblower statute. This statute protects employees who in good faith report a possible violation of law or who refuse an assignment that the employee has an objective, factual basis to believe violates any law.⁴⁷

The Eighth Circuit held that Minnesota's whistleblower statute had a direct connection to airline services, since it permitted flight attendants to refuse assignments, thereby jeopardizing the carrier's ability to complete its scheduled flights. The flight attendant's claims, therefore, were preempted by the ADA.⁴⁸

B. FEDERAL AVIATION REGULATIONS

*Skysign International, Inc. v. City & County of Honolulu*⁴⁹

The preemptive scope of Federal Aviation Administration (FAA) regulations was addressed in 2002 by the Ninth Circuit Court of Appeals in *Skysign International*. The suit was filed by an aerial advertising company, seeking a declaration that federal law barred the city of Honolulu from regulating navigable airspace by placing restrictions on aerial advertising.⁵⁰ The Ninth Circuit found that the FAA had a broad legislative grant to implement regulations regarding the use of navigable airspace. It further noted that it was within the FAA's statutory grant to adopt regulations preempting the Honolulu ordinance at issue.⁵¹ The fact that the FAA has the power to preempt the ordinance does not necessarily mean that it has preempted it. The court held that the Honolulu ordinance at issue did not conflict

⁴⁵ *Lyn-Lea Travel*, 283 F.3d at 289-90.

⁴⁶ *Botz v. Omni Air Int'l*, 286 F.3d 488 (8th Cir. 2002).

⁴⁷ *Id.* at 490-92 (discussing Minn. Stat. §§ 181.931-935 (2000 & Supp. 2001)).

⁴⁸ *Botz*, 286 F.3d at 498.

⁴⁹ *Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002).

⁵⁰ *Id.* at 1114-15.

⁵¹ *Id.* at 1116.

with FAA air traffic regulations and, therefore, was not preempted.⁵²

C. WARSAW CONVENTION - PREEMPTION OF ANTI-DISCRIMINATION STATUTES

The preemptive effect of the Warsaw Convention on discrimination claims has been the subject of several opinions this year. It is clear from a review of these cases that the U.S. Supreme Court's 1999 opinion in *El Al Israel Airlines, Ltd. v. Tseng*,⁵³ has greatly enhanced the preemptive effect of the Warsaw Convention in any claim arising from international air transportation.

1. Preempted

*King v. American Airlines, Inc.*⁵⁴

In *King*, the Second Circuit Court of Appeals upheld dismissal of a federal discrimination claim. Plaintiffs had been bumped from an American Airlines flight between Miami and Freeport. Thereafter, they brought suit against American under 42 U.S.C. § 1981 in the Northern District of New York for allegedly discriminating against them based on their race. The Second Circuit held that discrimination claims arising in the course of embarkation on an international flight are preempted by the Warsaw Convention.⁵⁵

*Gibbs v. American Airlines, Inc.*⁵⁶

A similar conclusion was reached by a D.C. District Court in *Gibbs*. This 42 U.S.C. § 1981 action was brought by a passenger who was forcibly removed from an American flight between Miami and Trinidad after he allegedly had an argument with a flight attendant. The passenger claimed that his removal from the aircraft was based on race. The district court discussed the claim and held "that discrimination statutes are preempted. . . under the [Warsaw] Convention."⁵⁷

2. Not Preempted

*Dasrath v. Continental Airlines, Inc.*⁵⁸

⁵² *Id.* at 1118.

⁵³ *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999).

⁵⁴ *King v. Am. Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002).

⁵⁵ *Id.* at 355, 358, 360.

⁵⁶ *Gibbs v. Am. Airlines, Inc.*, 191 F. Supp. 2d 144 (D.D.C. 2002).

⁵⁷ *Id.* at 145-47, 149.

⁵⁸ *Dasrath v. Cont'l Airlines, Inc.*, 228 F. Supp. 2d 531 (D.N.J. 2002).

Dasrath involves a claim by foreign-born passengers removed from a Continental flight between Newark and Tampa. The three passengers were seated in the first class section of the aircraft and had incited the suspicion of a white passenger seated in coach, primarily because the three foreign-born passengers were seated together and apparently were of Middle-Eastern appearance. The coach passenger reported her concerns to a flight attendant and the three first class passengers were thereafter asked to leave the aircraft. Once the flight departed, it became clear that these three passengers posed no risk: two were University of South Florida colleagues who were connecting from another Continental flight from London; the third was a non-revenue passenger. The passengers brought suit against Continental for alleged violations of 42 U.S.C. § 1981 and the New Jersey Law Against Discrimination. Significantly, the two international passengers sought only injunctive relief.⁵⁹

Faced with the broad reach of the *Tseng* preemption, and a number of cases holding that discrimination claims were preempted by the Warsaw Convention, the New Jersey District Court focused on the fact that the plaintiffs were not seeking monetary relief.⁶⁰ The court decided that injunctive relief was not preempted by Warsaw, based on the D.C. Circuit's opinion in *Cruz v. American Airlines, Inc.*⁶¹ The district court has certified the issue, however, for immediate appeal to the Third Circuit.

*Bayaa v. United Airlines, Inc.*⁶²

In *Bayaa*, the same conclusion regarding injunctive relief was reached in an unpublished opinion in California.⁶³ The recent bankruptcy of United Airlines has stayed the case, so appellate review of the decision by the Ninth Circuit may be postponed indefinitely.

III. MISCELLANEOUS WARSAW LITIGATION

A. WHEN IS TURBULENCE AN ACCIDENT?

*Magan v. Lufthansa German Airlines*⁶⁴

⁵⁹ *Id.* at 533-36.

⁶⁰ *Id.* at 540-42.

⁶¹ *Cruz v. Am. Airlines, Inc.*, 193 F.3d 526, 532 (D.D.C. 1999), *remanded*, 150 F. Supp. 2d 103, 119 (D.D.C. 2001) (addressing comment for injunctive relief as moot).

⁶² *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198 (C.D. Cal. 2002).

⁶³ *Id.* at 1202.

⁶⁴ *Magan v. Lufthansa German Airlines*, 181 F. Supp. 2d 396 (S.D.N.Y. 2002), *overruled by* 339 F.3d 158 (2d Cir. 2003).

In the case of *Magan v. Lufthansa German Airlines*, the Southern District of New York adopted a bright line test this year for determining when turbulence constitutes an accident under the Warsaw Convention. The plaintiff was injured while walking back to his seat from the lavatory during turbulence.

The court recognized that turbulence is neither an unexpected nor an unusual event in flight. At some point, however, it can become so severe as to constitute an accident under the Warsaw Convention. The court decided to adopt the FAA's turbulence classification system as a means for deciding whether turbulence encountered during a particular flight was sufficient to create a Warsaw accident. Light and moderate turbulence does not constitute an accident, while severe or extreme turbulence qualifies as an accident. Using this classification system, the court held that an aircraft involved in a Warsaw turbulence accident must encounter turbulence that causes large, abrupt changes in altitude or attitude, forcing occupants against seat belts, and making it impossible for them to walk.

With this test in hand, the court granted the defendant's motion for summary judgment. Since the plaintiff was injured while walking back to his seat during the turbulence event, the court reasoned that the aircraft could not have been in severe turbulence. One of the characteristics of severe turbulence under the FAA classification system is the inability of occupants to walk, which the plaintiff was doing at the time he was injured.

*Brunk v. British Airways, PLC*⁶⁵

It remains to be seen whether the bright line test adopted by the Southern District of New York in *Magan* will enjoy widespread acceptance. The D.C. District Court rejected it in the case of *Brunk v. British Airways, PLC*. As in *Magan*, the plaintiff in *Brunk* was injured when the aircraft encountered turbulence as she was returning to her seat from the lavatory.⁶⁶

The Brunk court reviewed the bright line test adopted by *Magan*, but declined to adopt that approach. The court felt that adopting the test would require the court to legislate from the bench. Instead, the D.C. District Court denied the defendant's motion for summary judgment, reserving for the jury the question of whether the turbulence encountered on the British Air-

⁶⁵ *Brunk v. British Airways, PLC*, 195 F. Supp. 2d 130 (D.D.C. 2002).

⁶⁶ *Id.* at 131.

ways flight was sufficiently unexpected and unusual to constitute an accident under Warsaw.⁶⁷

B. IN-FLIGHT PASSENGER ILLNESS AS A WARSAW ACCIDENT

It is well established that a passenger's internal reaction to the normal operation of an aircraft is not an accident under Warsaw.⁶⁸ Thus, when a passenger suffers an in-flight medical emergency due to a stroke or heart attack, it is not generally considered an accident. Prior to *Tseng*, the weight of authority also held that an air carrier's conduct in responding to the medical emergency was not an accident under the Convention.⁶⁹

The *Tseng* case has completely changed the playing field. Prior to that case, if a passenger injured during a flight could avoid Warsaw, he could probably use state law tort remedies. Now, if a passenger injured during flight is unable to identify a Warsaw accident, he probably has no remedy.⁷⁰

*Gupta v. Austrian Airlines*⁷¹

Two cases, decided in 2002, involving medical emergencies in-flight, demonstrate that courts are becoming more liberal in the definition of a Warsaw accident. In *Gupta*, a passenger suffered a heart attack and died on a flight between New Delhi and Vienna. Suit was brought against the airline, in the Northern District of Illinois, claiming that the passenger's death was caused, in part, by inadequate medical equipment on the airplane and improper training of the flight crew. The airline moved for summary judgment on the basis that no accident had taken place within the meaning of the Convention. The court denied the motion for summary judgment, holding that the "modern trend" of the law favors the view "that the negligent failure of the flight crew to serve appropriately the needs of an ailing passenger can constitute an accident under the [Warsaw] Convention."⁷²

*Husain v. Olympic Airways*⁷³

The Ninth Circuit Court of Appeals recently adopted a very broad definition of accident in an unusual case involving the

⁶⁷ *Id.* at 136.

⁶⁸ *Air France v. Saks*, 470 U.S. 392, 406 (1985).

⁶⁹ *See, e.g., Abramson v. Japan Airlines Co.*, 739 F.2d 130, 132-33 (3d Cir. 1984).

⁷⁰ *El Al Israel Airlines*, 525 U.S. at 176.

⁷¹ *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078 (N.D. Ill. 2002).

⁷² *Id.* at 1079, 1082-83, 1085.

⁷³ *Hussain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2215 (2003).

death of a passenger allegedly exposed to second-hand cigarette smoke. In *Husain*, a passenger suffering from asthma was seated three rows ahead of the smoking section on a flight between Athens and New York. The flight crew ignored repeated pleas from the passenger and his wife to move away from the smoking section. The crew erroneously claimed that the flight was full and refused to help the passengers find someone who might be willing to switch seats. Halfway through the flight, the asthmatic passenger suffered a severe attack and died.⁷⁴

On appeal, the carrier argued that there had been no accident within the meaning of Warsaw.⁷⁵ The Ninth Circuit disagreed and affirmed the \$1.4 million bench verdict against the airline. The Ninth Circuit held that “[t]he failure to act in the face of a known, serious risk satisfies the meaning of “accident” within Article 17, so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.”⁷⁶

C. DEFINITION OF EMBARKATION

*Marotte v. American Airlines, Inc.*⁷⁷

The Second and Eleventh Circuit Courts of Appeal reviewed the Warsaw definition of embarkation this year in two American Airlines cases. In *Marotte*, the plaintiff was an elderly gentleman who claimed to have been punched, tackled, and physically restrained by an American supervisor as he attempted to board a flight from Miami to New York.⁷⁸ The Eleventh Circuit adopted the definition of embarkation used in other circuits, which focuses on three factors: (1) the passenger’s activity at the time of the accident; (2) the passenger’s whereabouts at the time of the accident; and (3) the amount of control exercised by the carrier at the moment of injury. Applying these factors to the facts of the case, the court ruled that the plaintiff’s claim was subject to Warsaw.⁷⁹

*King v. American Airlines, Inc.*⁸⁰

⁷⁴ *Id.* at 833-34.

⁷⁵ *Id.* at 836.

⁷⁶ *Id.* at 837.

⁷⁷ *Marotte v. Am. Airlines, Inc.*, 296 F.3d 1255 (11th Cir. 2002).

⁷⁸ *Id.* at 1257-58.

⁷⁹ *Id.* at 1260-61.

⁸⁰ *King v. Am. Airlines, Inc.*, 284 F.3d 352, 358-60 (2d Cir. 2002).

The plaintiffs in *King*, filed suit when they were bumped from a flight between Miami and Freeport. At the time they were bumped, the Kings had been issued boarding passes and were seated on the bus that was to take them from the terminal to the aircraft. The Second Circuit Court of Appeals held that the plaintiffs were in the process of embarking on an international flight and were therefore subject to the Warsaw Convention. In reaching this conclusion, the Second Circuit declined to follow the rationale of older bumping cases such as *Wolgel v. Mexicana Airlines*,⁸¹ which placed the claim outside Warsaw because transport was never provided. The Second Circuit implied that this line of cases did not survive *Tseng*.⁸²

D. DEFINITION OF CARRIER

*Dazo v. Globe Airport Security Services*⁸³

The Ninth Circuit Court of Appeals adopted a narrow definition of the term carrier in *Dazo*. This case involved a theft claim at a security screening checkpoint by a passenger traveling from San Jose to Toronto. The passenger sued the security company as well as the carrier. The district court granted summary judgment on the grounds that the passenger was in the course of embarking on an international flight, and therefore, was subject to the Warsaw Convention.⁸⁴

The Ninth Circuit initially upheld summary judgment in a published opinion released in 2001.⁸⁵ On petition for rehearing, however, the court reversed summary judgment and reinstated the claims against the security company. Though the appeals court acknowledged that previous cases have extended carrier status to agents of an international airline (including security companies), the court refused to extend that status here. In the view of the majority of the Ninth Circuit, a security company that is a common agent for several airlines on an airport concourse is not entitled to carrier status under the Convention.⁸⁶ The court is somewhat vague in the rationale underlying

⁸¹ *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 444-45 (7th Cir. 1987) (ruling that a flight delay does not fall within the Warsaw Convention).

⁸² *King*, 284 F.3d at 362.

⁸³ *Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934 (9th Cir. 2001).

⁸⁴ *Id.* at 936-37.

⁸⁵ *Dazo v. Globe Airport Sec. Servs.*, 268 F.3d 671, 680-81 (9th Cir. 2001), *withdrawn and superseded by rehearing*, 295 F.3d 934 (9th Cir. 2002).

⁸⁶ *Dazo*, 295 F.3d at 939, 941.

this distinction – a fact that drew a strong dissent from one of the justices.

The appeals court also disputed whether the services being performed by the security company were in furtherance of a contract of carriage on an international flight.⁸⁷ This conclusion seems unusual, however, given that the Supreme Court's decision in *Tseng* arose from an incident during pre-flight security screening.⁸⁸

E. FORUM NON CONVENIENS UNDER WARSAW

*Hosaka v. United Airlines, Inc.*⁸⁹

Hosaka presents an extensive review of forum non conveniens under the Warsaw Convention. Plaintiffs were Japanese nationals aboard a United Airlines flight from Tokyo to Honolulu that encountered severe turbulence en route, leading to several injuries and a death. Suit was filed in the Northern District of California, but was dismissed on the grounds that Japan was a more convenient forum.⁹⁰

The Warsaw Convention permits suit to be filed where the carrier is domiciled or has its principal place of business.⁹¹ In accordance with precedent from the Fifth Circuit,⁹² however, the district court held that this venue clause was still subordinate to the court's power to dismiss in favor of a more convenient forum overseas.⁹³

The Ninth Circuit performed an extensive review of the history of the Convention and forum non conveniens. According to the opinion, forum non conveniens is a common law doctrine that was rarely employed by the courts of member countries when the treaty was adopted in 1929 and is an alien concept to civil jurisdictions.⁹⁴ The Ninth Circuit could find no support in the language of the treaty, or in its drafting history, for the proposition that forum non conveniens could overrule the express

⁸⁷ *Id.* at 938-39.

⁸⁸ *See El Al Israel Airlines*, 525 U.S. at 163, 166.

⁸⁹ *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), *cert denied* 123 S. Ct. 1284 (2003).

⁹⁰ *Id.* at 993.

⁹¹ Warsaw Convention, *supra* note 1.

⁹² *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 883 F.2d 17, *reinstating* 821 F.2d 1147, 1161-62 (5th Cir. 1987) (en banc) (holding that a court may apply the doctrine of forum non conveniens in a Warsaw Convention case).

⁹³ *Hosaka*, 305 F.3d at 993.

⁹⁴ *Id.* at 997-99.

choice of forum clause contained in the Convention.⁹⁵ Therefore, the court concluded that forum non conveniens may not be used to dismiss a case in favor of a forum in another country.⁹⁶

F. CLASS CERTIFICATION OF A WARSAW CLAIM

*Lee v. American Airlines, Inc.*⁹⁷

Lee is a case from the Northern District of Texas dealing with class certification under the Warsaw Convention. The plaintiff was a passenger aboard an American flight from New York Kennedy to London Heathrow that took an extended delay at the gate and was eventually cancelled. Plaintiff brought suit against American, under Article 19 of the Warsaw Convention, for damages he allegedly sustained as a result of the flight delay. He thereafter sought class certification on behalf of the 218 other similarly situated passengers on the flight.⁹⁸

The district court performed a lengthy analysis of class certification requirements and found that most of those requirements had been satisfied by the plaintiff.⁹⁹ One of the requirements for certification, however, is the existence of common issues of law and fact between the potential class members.¹⁰⁰ That determination can be very complex in a Warsaw case. Though the Warsaw Convention defines liability for a carrier, damages are calculated using domestic law selected under the forum's choice of law rules.¹⁰¹ In Texas, that means the forum with the "most significant relationship."¹⁰² This requires the court to apply an individual choice-of-law analysis to each class member's claim and identify any conflicts in the laws of the various jurisdictions. Since this particular case involved potential class members from 10 states and 17 countries, the plaintiff was required to provide the court with an analysis of the variance in pertinent damages laws among the jurisdictions at issue. The court declined to cer-

⁹⁵ *Id.* at 1000-01.

⁹⁶ *Id.* at 1000-04.

⁹⁷ *Lee v. Am. Airlines, Inc.*, No. Civ.A.3:01-CV-1179-P, 2002 WL 31230803 (N.D. Tex. Sept. 30, 2002).

⁹⁸ *Id.* at *1.

⁹⁹ *Id.* at *4-9.

¹⁰⁰ FED. R. CIV. P. 23(b)(3).

¹⁰¹ *Lee*, 2002 WL 31230803, at *11.

¹⁰² *Id.*

tify the class because that information was not provided in the plaintiff's motion.¹⁰³

IV. GARA LITIGATION

*Estate of Kennedy v. Bell Helicopter Textron, Inc.*¹⁰⁴

Manufacturers seeking to raise the General Aviation Revitalization Act of 1994 (GARA) as a defense should look closely at a 2002 opinion from the Ninth Circuit. In *Estate of Kennedy*, suit was filed on behalf of a pilot who was flying a surplus Huey and was killed when the Huey self destructed.¹⁰⁵ This particular Huey was originally manufactured by Bell and delivered to the U.S. Navy in 1970. The Navy sold the helicopter as military surplus in 1984. The Huey received its first type certification and airworthiness certificate in 1986.¹⁰⁶

In the district court, Bell moved for summary judgment on the grounds that the helicopter was delivered to its first purchaser, the U.S. Navy, in 1970. GARA's eighteen year statute of repose would therefore bar the claim. The plaintiff countered that the statute of repose did not begin to run until 1986, the date the helicopter received its first type certification for civilian use and first became a "general aviation aircraft" under the statute.¹⁰⁷ The district court agreed with the plaintiff and denied Bell's motion for summary judgment.¹⁰⁸

Rather than trying the case and appealing the district court's decision, Bell filed an interlocutory appeal with the Ninth Circuit. Interlocutory appeals are rarely permitted, but the Ninth Circuit held that the GARA statute of repose creates an explicit statutory right not to stand trial.¹⁰⁹ In the Ninth Circuit, a manufacturer appears to have the right to seek immediate appellate review of a district court's denial of the GARA statute of repose defense.

Turning to the merits of the case, the Ninth Circuit concluded that GARA's statute of repose begins to run on the date any aircraft is first delivered, "even if the aircraft cannot be con-

¹⁰³ *Id.* at *12.

¹⁰⁴ *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107 (9th Cir. 2002).

¹⁰⁵ *Id.* at 1109.

¹⁰⁶ *Id.* at 1111-12.

¹⁰⁷ *Id.* at 1112.

¹⁰⁸ *Id.* at 1109.

¹⁰⁹ *Id.* at 1111.

sidered a general aviation aircraft at that time.”¹¹⁰ Since the helicopter was first delivered to the Navy in 1970, the Ninth Circuit reversed the district court’s denial of summary judgment and dismissed the plaintiff’s claims against Bell.¹¹¹

*Mason v. Schweizer Aircraft Corp.*¹¹²

The application of GARA to purchasers of an aircraft type certificate was examined in 2002 by the Supreme Court of Iowa in *Mason*. The plaintiff was injured in the crash of a Hughes 269A, manufactured and sold in 1968. The type certificate on the 269 product line was acquired by Schweizer in 1986 from McDonnell Douglas. Though Schweizer never manufactured a 269A, it manufactures C and D models and provides maintenance support materials for the 269A, including maintenance manual updates.¹¹³

The plaintiff brought suit against Schweizer in two capacities: as the manufacturer of the 269A by virtue of its purchase of the type certificate, and as the publisher of 269A maintenance manuals that were allegedly defective for failing to warn of component defects that led to the crash of this particular helicopter. The trial court granted summary judgment in favor of Schweizer on all claims, based on GARA’s eighteen year statute of repose.¹¹⁴

On appeal, the Supreme Court of Iowa upheld the dismissal of claims against Schweizer in its capacity as a manufacturer. To the extent Schweizer acquired the status of manufacturer by purchasing the type certificate, it should also be extended the protection of GARA.¹¹⁵

Once the court decided that GARA applied to Schweizer, it also upheld the dismissal of the failure to warn claim arising from Schweizer’s publication of the maintenance manual. In the court’s view, maintenance manuals are part of the aircraft itself, and thus failure to warn claims relating to maintenance manuals are claims made against a defendant in its capacity as manufacturer. Therefore, GARA’s eighteen-year statute of repose affords protection to the successor of the manufacturer.¹¹⁶

¹¹⁰ *Id.* at 1112.

¹¹¹ *Id.*

¹¹² *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543 (Iowa 2002).

¹¹³ *Id.* at 545.

¹¹⁴ *Id.* at 546.

¹¹⁵ *Id.* at 549-50.

¹¹⁶ *Id.* at 550-52.

V. PRIVATE CAUSES OF ACTION ARISING UNDER FEDERAL AVIATION STATUTES AND REGULATIONS

In 2001, the U.S. Supreme Court issued an opinion in *Alexander v. Sandoval*, making clear that private causes of action to enforce federal laws must be created by Congress.¹¹⁷ According to *Sandoval*, a federal statute must contain text displaying an intent by Congress to create not just a private right, but also a private remedy.¹¹⁸ If that intent cannot be found in the text of the statute, a private cause of action does not exist, "no matter how desirable that might be as a policy matter or how compatible a private remedy might be with the statute."¹¹⁹ The *Sandoval* opinion has had significant impact in several aviation cases this year where plaintiffs have attempted to assert private causes of action under federal statutes.

A. AIR CARRIER ACCESS ACT

In *Love v. Delta Airlines, Inc.*, the Eleventh Circuit held that the Air Carrier Access Act (ACAA) does not create a private cause of action.¹²⁰ In *Love*, the plaintiff became ill during flight and was unable to walk to the lavatory, having to be carried there instead by her son. The plaintiff alleged that Delta violated the ACAA by failing to provide an aisle chair to assist her in reaching the lavatory, failing to provide adequately trained personnel, and because the lavatory was too small. The plaintiff sought compensatory and punitive damages, as well as a permanent injunction, requiring Delta to provide aisle chairs in-flight, install larger lavatories, and train its personnel to better assist handicapped passengers.¹²¹ The district court held that, while the plaintiff was not entitled to seek monetary relief, the ACAA implies a private cause of action for declaratory and injunctive relief. The court granted Delta leave, however, to seek interlocutory review of the issue.¹²²

On appeal, the Eleventh Circuit Court of Appeals examined the legislative history of the ACAA in the context of the *Sandoval*

¹¹⁷ *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 286-87.

¹²⁰ *Love v. Delta Airlines, Inc.*, 310 F.3d 1347, 1351 (11th Cir. 2002).

¹²¹ *Id.* at 1350-51.

¹²² *Id.* at 1351.

opinion.¹²³ The Eleventh Circuit noted that the statute creates a comprehensive enforcement scheme through administrative procedures in the Department of Transportation (DOT).¹²⁴ This administrative framework expressly creates an enforcement mechanism that can be initiated by a disabled person filing a complaint with the DOT.¹²⁵ The fact that Congress had expressly provided private litigants with this administrative action powerfully suggested to the Eleventh Circuit that Congress did not intend to provide other private rights of action.¹²⁶ Finding no language in the statute that displayed an intent by Congress to create a private cause of action, the Eleventh Circuit held that no private cause of action exists under the ACAA.¹²⁷

B. AIRLINE DEREGULATION ACT

In *Casas v. American Airlines, Inc.*, the Fifth Circuit addressed private causes of action under the Airline Deregulation Act (ADA) in the wake of *Sandoval*.¹²⁸ The plaintiff in *Casas* brought suit for loss of a video camera in checked luggage, claiming in part that he had a private cause of action for the loss under regulations adopted pursuant to the ADA.¹²⁹ The regulations at issue prohibit an airline from limiting its liability for lost luggage to an amount less than \$1250.¹³⁰ The district court held that the ADA implies such a private cause of action where the carrier seeks to limit its loss to an amount less than \$1250.¹³¹

On appeal, the Fifth Circuit Court of Appeals applied the *Sandoval* factors and could find no language in the ADA evidencing an intent on the part of Congress to create a private remedy. Further, the court noted that Congress adopted a comprehensive enforcement procedure under the ADA, strongly suggesting that it did not intend to create a private cause of action.¹³² This opinion was issued prior to the Eleventh Circuit's decision in *Love*, but the rationale in the two cases is identical. Thus, *Casas* should be very persuasive authority for a litigant arguing that

¹²³ *Id.* at 1353.

¹²⁴ *Id.* at 1354.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1354, 1357.

¹²⁷ *Id.* at 1359.

¹²⁸ *Casas v. Am. Airlines, Inc.*, 304 F.3d 517 (5th Cir. 2002).

¹²⁹ *Id.* at 519.

¹³⁰ 14 C.F.R. § 254.4 (1984), amended by 14 C.F.R. § 254.4 (1999).

¹³¹ *Casas*, 304 F.3d at 520.

¹³² *Id.* at 522-23.

the Fifth Circuit has effectively abandoned its position in *Shinault v. American Airlines, Inc.*,¹³³ and that the Fifth Circuit no longer recognizes a private cause of action under the ACAA.

C. FAA SECURITY REGULATIONS

In the case of *TWU Local 555 v. Southwest Airlines Co.*, a Southwest Airlines union brought suit to challenge any attempt by the company to discipline or discharge employees based on information uncovered in criminal background checks.¹³⁴ Under the terms of the newly enacted Aviation and Transportation Security Act, carriers are required to conduct a Criminal History Record Check on all current and prospective employees.¹³⁵ Should the record check disclose that the employee has been convicted of any of the 28 listed offenses within the previous ten years, that person is no longer qualified to have unescorted access to an aircraft or to a secure area of an airport.¹³⁶

The union brought suit to prevent Southwest from using information obtained through the Criminal History Record Check to discipline or discharge employees convicted of offenses outside the ten year period or not specifically listed as disqualifying by the Act. The union claimed that a private cause of action existed to enforce the specific terms of the Act, which it alleged Southwest was exceeding.¹³⁷

The district court examined the Aviation and Transportation Security Act in light of the *Sandoval* opinion and was unable to find anything in the Act suggesting that Congress expressly or impliedly authorized a private cause of action. The court dismissed the suit and held that there is no private federal cause of action to enforce FAA regulations concerning employment background checks.¹³⁸

VI. GOVERNMENT CONTRACTOR DEFENSE CASES

*Densenberger v. United Technologies Corp.*¹³⁹

¹³³ *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796, 804 (5th Cir. 1991) (holding that private causes of action are allowed under the ACAA because Congress did not expressly restrict the remedies under the ACAA).

¹³⁴ *TWU Local 555 v. Southwest Airlines Co.*, No. Civ.A. 3:302-CV-0554P, 2002 WL 31245372, at *1 (N.D. Tex. Oct. 1, 2002).

¹³⁵ See 49 U.S.C. §§ 44936(a), (b)(1)(A).

¹³⁶ See 49 U.S.C. § 44936(b)(1)(A).

¹³⁷ *TWU Local 555*, 2002 WL 31245372, at *1-2.

¹³⁸ *Id.* at *3.

¹³⁹ *Densenberger v. United Techs. Corp.*, 297 F.3d 66 (2d Cir. 2002).

In *Densberger*, the Second Circuit Court of Appeals examined the scope of the government contractor defense in failure to warn cases.¹⁴⁰ The matter arose when a Blackhawk helicopter operated by the U.S. Army crashed while landing as the pilot was executing a shallow right turn to line up with the pad. The pilot was unable to level the helicopter, which turned steeply to the right, completing a 360 degree turn and crashed on its right side. Post-accident investigation suggested that the crash was caused by unequal fuel loads in the auxiliary external tanks. One tank was nearly empty, while the other was nearly full.¹⁴¹

Following an eleven day trial, a jury awarded plaintiffs \$23 million, finding that United Technologies was negligent for failing to warn the Army that the helicopter could become uncontrollable during foreseeable flight conditions. United Technologies appealed the verdict, in part on the grounds that it was entitled to immunity as a government contractor.¹⁴²

It was undisputed that the Blackhawk helicopter was manufactured for the U.S. Army, which was heavily involved in its development and testing.¹⁴³ On appeal, however, the Second Circuit expressed considerable doubt that the government contractor defense was even relevant to the case.¹⁴⁴ The Second Circuit narrowly applies the government contractor defense in failure to warn cases. The defense is implicated in the Second Circuit only where it involves the content of warnings meant to accompany the product itself.¹⁴⁵ Since the issue in this case involved the sufficiency of warnings given to the Government by the manufacturer, the government contractor defense was not implicated under Second Circuit precedent.¹⁴⁶

*Hall v. Raytheon Aircraft*¹⁴⁷

A very different approach to failure to warn government contractor cases was illustrated by the Western District of Michigan in *Hall*.¹⁴⁸ This was a wrongful death action arising from the crash of a modified Beech King Air being operated by the Army

¹⁴⁰ *Id.* at 68.

¹⁴¹ *Id.* at 69.

¹⁴² *Id.*

¹⁴³ *Id.* at 68.

¹⁴⁴ *Id.* at 75.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Hall v. Raytheon Aircraft*, No. 1:01-CV-221, 2001 U.S. Dist. LEXIS 9219 (W.D. Mich. May 15, 2002).

¹⁴⁸ *Id.*

for electronic reconnaissance. Plaintiffs brought suit against Raytheon, claiming that design defects caused the RC-12K Guardrail aircraft to enter an unrecoverable spin.¹⁴⁹

Raytheon moved for summary judgment based on the government contractor defense and plaintiffs responded that the RC-12K was essentially an "off the shelf" King Air and that the design defects were inherent to the aircraft, existing in civilian versions as well.¹⁵⁰ Plaintiffs also argued that Raytheon failed to warn the Government that the aircraft could become uncontrollable during foreseeable flight conditions (which is the same argument made by plaintiffs in the *Densberger* case).¹⁵¹

The district court granted summary judgment in favor of Raytheon.¹⁵² With respect to the claim that the aircraft was an "off the shelf" version, the court noted that there was a great deal of uncontroverted evidence in the record showing that the Army had participated extensively in the design of the RC-12K and that it was very different from a standard King Air.¹⁵³ On the failure to warn claim, the court held that Raytheon's duty to warn the Government was a duty to warn of dangers known to Raytheon, but not known to the Government. The court could find no evidence in the record to controvert Raytheon's position that the Government was equally knowledgeable as to all risks inherent in the operation of the aircraft.¹⁵⁴

VII. AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT CASES

Eleven days after the terrorist attacks on the World Trade Center, President Bush signed into law the Air Transportation Safety and System Stabilization Act.¹⁵⁵ As part of the legislation, Congress created a federal cause of action for damages arising out of the September 11th hijackings and subsequent crashes.¹⁵⁶ The Act also sets original and exclusive jurisdiction for all suits in the Southern District of New York.¹⁵⁷ The first few opinions

¹⁴⁹ *Id.* at *1, *3-4.

¹⁵⁰ *Id.* at *5, *15.

¹⁵¹ *Id.* at *5.

¹⁵² *Id.* at *37.

¹⁵³ *Id.* at *18.

¹⁵⁴ *Id.* at *29, *30-31.

¹⁵⁵ Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

¹⁵⁶ *Id.* § 408(b)(1).

¹⁵⁷ *Id.* § 408(b)(3).

arising under this comprehensive legislation have all involved the scope of this new federal cause of action.

*730 Bienville Partners, Ltd. v. Assurance Co. of American International*¹⁵⁸

Three cases in 2002 involve insurance disputes arising from September 11th claims. In *730 Bienville Partners, Ltd.*, the plaintiff filed suit against its insurer in the Eastern District of Louisiana seeking business interruption benefits under its CGL policy. The business interruption loss stemmed from the closure of U.S. airports beginning on September 11th.¹⁵⁹

The defendant insurer moved the court to transfer venue to the Southern District of New York, contending that exclusive jurisdiction of the claim was in that court since it arose out of the September 11th hijackings. The district court examined the statute and held that, while the September 11th attacks were implicated by the plaintiff's claim, it was primarily a breach of contract suit and the motion to transfer was denied.¹⁶⁰

*Canada Life Assurance Co. v. Converium Ruckerversicherung*¹⁶¹

The Southern District of New York granted a motion to dismiss for lack of subject matter jurisdiction in *Canada Life Assurance Co.*¹⁶² The case involved a claim by one re-insurer seeking indemnity from another for payment of numerous September 11th life insurance claims. Suit was filed in the Southern District of New York by Canada Life on the basis that the dispute arose from the September 11th attacks.¹⁶³

The court examined the Stabilization Act and its legislative history in detail and held that it did not have jurisdiction over this particular dispute because while the Act may apply broadly to actions filed by individual victims of September 11th, it did not encompass contractual disputes between re-insurers.¹⁶⁴

*Goodrich Corp. v. Winterthur International America Insurance Co.*¹⁶⁵

¹⁵⁸ *730 Bienville Partners, Ltd. v. Assurance Co. of Am. Int'l*, No. Civ.A. 02-0106, 2002 WL 985809 (E.D. La. Apr. 16, 2002), *aff'd*, No. 02-31071, 2003 U.S. App. LEXIS 8570 (5th Cir. Apr. 29, 2003).

¹⁵⁹ *Id.* at *1.

¹⁶⁰ *Id.* at *2.

¹⁶¹ *Canada Life Assurance Co. v. Converium Ruckerversicherung*, 210 F. Supp. 2d 322 (S.D.N.Y. 2002), *aff'd*, 335 F.3d 52 (2d Cir. 2003).

¹⁶² *Id.* at 323-24.

¹⁶³ *Id.* at 325.

¹⁶⁴ *Id.* at 327, 330.

¹⁶⁵ *Goodrich Corp. v. Winterthur Int'l Am. Ins. Co.*, No. 5:02CV367, 2002 WL 31833646 (N.D. Ohio June 17, 2002).

Goodrich Corp. involved another coverage dispute between an insured and its insurer over a business interruption claim.¹⁶⁶ The insured asserted a claim for loss of revenue stemming from the cancellation of orders for aerospace goods and services following September 11th. The defendant insurer moved to dismiss or transfer venue to the Southern District of New York based on the exclusive jurisdiction clause of the Stabilization Act.¹⁶⁷

The district court in Ohio examined the history and purpose of the Act. Citing the previous decisions in *Bienville* and *Canada Life*, the court held that Congress did not intend the Stabilization Act to apply to disputes between an insured and its insurer over the coverage available under an insurance policy.¹⁶⁸ Consequently, the defendant's motion to dismiss or transfer venue was denied.¹⁶⁹

*Graybill v. City of New York*¹⁷⁰

On September 11, 2002, the Southern District of New York issued an opinion recognizing that the Stabilization Act was passed in great haste and contains certain ambiguities that cannot be clarified by its scant legislative history in *Graybill*.¹⁷¹ The suit was filed in state court by a construction worker who was injured during clean-up at the World Trade Center site and the case was removed by the defendant to the Southern District of New York based on the Stabilization Act.¹⁷²

In its opinion, the court struggled with the fact that the Act creates a federal cause of action for damages *arising out of* the hijackings and crashes, yet confers exclusive jurisdiction on the Southern District of New York for all actions *resulting from or relating to* the crashes.¹⁷³ "Arising out of" and "resulting from and relating to" are not synonymous phrases, and legislative history does not explain why different language was used.¹⁷⁴ Arguments could be made that one phrase is broader or narrower than the other.

¹⁶⁶ *Id.* at *1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *4-5.

¹⁶⁹ *Id.* at *6.

¹⁷⁰ *Graybill v. City of New York*, 247 F. Supp. 2d 345 (S.D.N.Y. 2002).

¹⁷¹ *Id.* at 346, 350.

¹⁷² *Id.* at 346.

¹⁷³ *Id.* at 349.

¹⁷⁴ *Id.* at 350.

The Southern District of New York concluded that the ambiguity could not be resolved using ordinary statutory interpretation. It therefore decided that "a line must be drawn" to separate those claims Congress intended to reach with the Stabilization Act from those it intended to exclude.¹⁷⁵ The line the court drew was based on the tort concept of proximate cause. Any claim that is both caused in fact and a foreseeable result of the events on September 11th is covered by the Stabilization Act. As in tort law, superceding, intervening events break the chain of causation and place a claim outside the Act.¹⁷⁶

In this particular case, the Southern District of New York concluded that plaintiff's claims were too remote from the events of September 11th.¹⁷⁷ The plaintiff was injured in an accident that was common to construction sites. The alleged negligence of the site-owners was a superceding, intervening cause that would break any chain of causation.¹⁷⁸

VIII. MISCELLANEOUS AVIATION LITIGATION

A. CIVIL RIGHTS

United Airlines and the City of Los Angeles were sued by a passenger in California for an alleged civil rights violation stemming from a manual search of his bag. The incident giving rise to *Torbet v. United Airlines, Inc.*,¹⁷⁹ took place in 1998 when the plaintiff passed through United's security checkpoint at the Los Angeles airport. The plaintiff placed his bag on the x-ray belt and he proceeded through the metal detector. His bag went through the x-ray machine without exciting any particular suspicion. On the other side of the checkpoint, the plaintiff was advised that his bag had been selected for random search. The plaintiff refused to consent to the search, at which point a police officer was summoned. The police officer told the plaintiff that he was not free to leave the area until his bag had been searched. The plaintiff agreed and the subsequent search revealed nothing of significance.¹⁸⁰

After returning from his trip, the plaintiff filed suit for alleged violation of his Fourth Amendment right to be free from unrea-

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 351.

¹⁷⁷ *Id.* at 351-52.

¹⁷⁸ *Id.*

¹⁷⁹ *Torbet v. United Airlines, Inc.*, 298 F.3d 1087 (9th Cir. 2002).

¹⁸⁰ *Id.* at 1087-88.

sonable search and seizure. This claim was dismissed by the district court.¹⁸¹ On appeal, the Ninth Circuit Court of Appeals held that the plaintiff impliedly consented to further search when he placed his bag on the conveyor belt. Unless and until an x-ray scan is able to rule out every possibility of dangerous contents, manual search of screened bags is permitted by the Fourth Amendment.¹⁸²

B. CRIMINAL PROSECUTION

*United States v. Cothran*¹⁸³ is a good illustration of the fact that false statements can get you in a great deal of trouble. The incident giving rise to this criminal prosecution took place in 1999 when the defendant telephoned the U.S. Airways reservation office in Pittsburgh. In the course of his conversation, the defendant stated that he was upset with U.S. Airways for not letting him bring explosives on the plane and that he wanted to blow-up an airplane at 35,000 feet. Subsequently, he told the agent that he was merely joking.¹⁸⁴

At trial, the only evidence of the exact statement by the defendant was the testimony of the reservation agent. After the passenger made the alleged statement, the agent pressed the emergency recording button on her phone set. This recording did not pick up the threatening statement, but it did record the passengers' laughter and subsequent statement that he was merely joking.¹⁸⁵

The defendant was convicted by the jury for falsely conveying his intent to carry explosives aboard a plane and he was sentenced to ten months in federal prison and three years of probation.¹⁸⁶ His conviction was upheld on appeal to the Third Circuit.¹⁸⁷

C. CONSULTING EXPERT DISQUALIFICATION

Texas practitioners may want to review a case out of the Fort Worth Court of Appeals entitled *In re Bell Helicopter Textron*,

¹⁸¹ *Id.* at 1088-89.

¹⁸² *Id.* at 1089-90.

¹⁸³ *United States v. Cothran*, 286 F.3d 173 (3d Cir. 2002).

¹⁸⁴ *Id.* at 175.

¹⁸⁵ *Id.* at 176.

¹⁸⁶ *Id.* at 174.

¹⁸⁷ *Id.*

*Inc.*¹⁸⁸ This was a mandamus action filed by Bell seeking disqualification of plaintiffs' counsel. The underlying lawsuit arose from the crash of a Bell 412 in Cuernavaca, Mexico. Plaintiffs' counsel had employed a consulting expert in the case who was a former Bell employee. This former employee worked for Bell between 1977 and 1987 in a variety of safety and development positions, eventually becoming Chief of Flight Safety. During her employment with Bell, she worked with the company's in-house and outside counsel in the defense of product liability actions, including actions arising from 412 crashes.¹⁸⁹

In moving to disqualify, Bell presented evidence that plaintiffs' consulting expert was present at numerous meetings with Bell's counsel where legal strategy was discussed, including strategy in suits involving the 412.¹⁹⁰ The court of appeals held that Bell's evidence was sufficient to raise a conclusive presumption that confidences and secrets were imparted to the former employee.¹⁹¹

Because the former employee was not a lawyer, the fact that she is deemed to be in possession of confidential information is not necessarily disqualifying. Plaintiffs could retain her services as a consulting expert in cases against her former employer as long as they strictly adhered to a screening process and as long as no confidential information was actually conveyed by the consultant to plaintiffs' counsel.¹⁹² The screening process requires the following steps:

- a) The newly hired consultant must be cautioned not to disclose any information relating to the representation of her former employer;
- b) The consultant must be instructed not to work on any matter on which she worked during the prior employment, or which she has information relating to the former employer's representation;
- c) The hiring firm should take other reasonable steps to ensure that the non-lawyer does not work in connection with matters on which she worked during the prior employment.¹⁹³

¹⁸⁸ *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, no pet. h.).

¹⁸⁹ *Id.* at 139-44.

¹⁹⁰ *Id.* at 144.

¹⁹¹ *Id.* at 147.

¹⁹² *Id.* at 145-46.

¹⁹³ *Id.* at 147.

Though Bell presented no direct evidence that confidential information had been conveyed, and plaintiffs' counsel provided evidence that they complied with the screening requirements, the court of appeals concluded that the consultant's former position and duties made it impossible for her to be effectively screened.¹⁹⁴ As a consulting expert in a 412 case, she would be required to work on the other side of litigation that is substantially related to litigation on which she previously worked while in Bell's employ.¹⁹⁵

Unfortunately for plaintiffs, the disqualification of their consultant is imputed to their attorneys. Thus, the court of appeals granted mandamus, directing the trial court to enter an order disqualifying the expert *and plaintiffs' counsel* from further representation in the case.¹⁹⁶

D. INSURANCE COVERAGE - PASSENGER SUB-LIMIT

The Tenth Circuit Court of Appeals decided a case recently under Colorado law that very narrowly defined the passenger sub-limit on an aviation policy. In *Old Republic Insurance Co. v. Durango Air Services, Inc.*, the underlying claim arose from a general aviation accident in which the pilot and two passengers were killed.¹⁹⁷ Following the accident, wrongful death suits were filed against several insureds of Old Republic by the estates of the passengers.¹⁹⁸ Old Republic insured the defendants under a standard aviation liability policy with limits of \$100,000 per passenger and \$1,000,000 per occurrence. Old Republic offered to settle the passenger claims for \$100,000 each, but this offer was declined. The insureds thereafter confessed judgment in Colorado state court in the amount of \$4.05 million. Old Republic tendered \$200,000, representing its sub-limit for passengers, and filed a declaratory judgment action in federal court.¹⁹⁹

At the trial court level, the insureds successfully contended that the passenger sub-limit does not apply to mental anguish claims asserted by survivors of the decedents. Combining the passenger claims with the claims of surviving family members,

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 148.

¹⁹⁶ *Id.* at 151.

¹⁹⁷ *Old Republic Ins. Co. v. Durango Air Servs., Inc.*, 283 F.3d 1222, 1223 (10th Cir. 2002).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1223-24, 1226.

the district court held that Old Republic was required to indemnify the insureds for \$700,000 under the aviation policy.²⁰⁰

The Tenth Circuit affirmed the decision of the trial court.²⁰¹ Noting that the aviation policy insured against bodily injury claims by non-passengers, and that the policy definition of bodily injury includes mental anguish, the Tenth Circuit focused on the exact language describing the \$100,000 passenger sub-limit.²⁰² This limitation applied to damages because of bodily injury to passengers. The Tenth Circuit interpreted this limitation as applying only to claims made by passengers. Without much discussion, the court rejected the argument that mental anguish claims by family members of passengers are necessarily the result of the passengers' injuries.²⁰³

XI. CONCLUSION

Courts and aviation litigants in 2002 continued to struggle with the existence and scope of complete preemption under the Federal Aviation Act of 1958, the Airline Deregulation Act, and the Warsaw Convention. In general terms, aviation defendants fared better in the Second and Third Circuits on complete preemption removals. On the other hand, the Ninth Circuit has rejected complete preemption removal under the Airline Deregulation Act.

In Warsaw litigation, there was a continued effort by claimants in 2002 to expand the types of claims covered by the Convention. This is most likely a consequence of the U.S. Supreme Court's 1999 decision in *Tseng*, which effectively barred any other bodily injury claim arising from international air transportation that was not covered by the Warsaw Convention.

A very significant GARA decision came out of the Ninth Circuit in 2002, interpreting the Act as a statute of repose rather than a statute of limitation. This permits interlocutory appeal (at least in the Ninth Circuit) of a trial court's decision not to apply GARA. The favorable outcome for manufacturers in GARA litigation in 2002 was offset by a significant loss in the Second Circuit on a government contractor defense case. The Second Circuit interpreted the scope of the defense in such a way that it may be very difficult to apply in failure to warn cases.

²⁰⁰ *Id.* at 1224, 1228.

²⁰¹ *Id.* at 1227.

²⁰² *Id.* at 1227-28.

²⁰³ *Id.*

Finally, in 2002, the Eleventh Circuit rejected a claim for damages based on an alleged violation of the Air Carrier Access Act. Applying new precedent from the U.S. Supreme Court, the Eleventh Circuit held that there is no private cause of action under the Act.

Transcript

